90-4 26 (1)

No. ________

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

DAVID E. AND SANDRA L. GANTNER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Whether the lower court erred in defining the standard of "substantial justification". The lower court denied Petitioner an award of litigation costs as the prevailing party in Tax Court litigation, based on the premise that the Commissioner's position was substantially justified, where such position had no authority whatever, either in case law or in statute. In other words, is "no authority" the equivalent of "subtantial justification", which entitles the government to shift the costs of litigation to the taxpayer when it seeks to advance a novel theory and make new law.

PARTIES BELOW

Parties before the United States Court of Appeals for the Eighth Circuit were David E. and Sandra L. Gantner as Appellants/Cross-Appellees and the Commissioner of Internal Revenue as Appellee/Cross-Appellant.

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SUPREME COURT OF THE UNITED STATES

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No. ________

DAVID E. AND SANDRA L. GANTNER,

v.

COMMISSIONER OF INTERNAL REVENUE,

PETITION FOR A WRIT OF CERTIORARI FROM THE

UNITED STATES COURT OF APPEALS FOR THE

EIGHT CIRCUIT

David E. and Sandra L. Gantner petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra) is reported at 66 AFTR2d 90-5163. The opinion of the

United States Tax Court (App. C, infra) is reported at 91 T.C. 47 and 92 T.C. 192.

JURISDICTION

The opinion of the Court of Appeals (App. B, infra) was entered on June 12, 1990. The jurisdiction of this uCourt is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Section 7430 of the Internal Revenue Code of 1954 (26 U.S.C.) are set out in a statutory appendix, App. D, infra.

STATEMENT

An audit was commenced in the fall of 1981, a Statutory Notice of Deficiency was issued November 4, 1985, and a Petition was filed January 21, 1986. The case was tried before the Honorable Thomas B. Wells in St. Paul, Minnesota, on May 22 and May 29, 1987. The primary issue was whether losses on sales of stock options were subject to disallowance as wash sales pursuant to section 1091. The Petitioner contended they were not subject to §1091 for three reasons:

> First - The loss was not an artificial loss but rather a real loss, and
>
> Second - Section 1091 makes no reference to the sale of options but rather limits its application to the sale of stock or securities, and
>
> Third - Even if "options" were subject to section 1091, it would still not have applied to this Petitioner since he was in the "trade or business" of dealing in options.

The Tax Court in an opinion issued September 29, 1988 held for the Petitioner on the basis of the second argument set forth above and thus found it unnecessary to consider the first and third.

The Petitioner, having substantially prevailed both with respect to the amount in controversy and the most significant issue, submitted his motion for an award of reasonable litigation costs because the agency was not

substantially justified in litigating this case, but rather, it had chosen to litigate a case which was bereft of any support in statute, regulations or case law. Furthermore, the agency had been unreasonable in its actions both at the audit and the administrative level, and continued to remain unreasonable throughout the course of the litigation. It had adopted a pre-litigation position which included abusive conduct toward the taxpayer and his representatives, and complete intransigence toward settlement during the pre-trial conferences and course of the litigation. The applicable statute is 26 U.S.C. 7430 as amended by the 1986 Tax Reform Act. The agency's legal representative thwarted all efforts on the part of the taxpayer to settle on a compromise basis and rejected numerous reasonable offers to split the issue electing to maintain a position that the maximum concession on the part of the government would be in the area of 7% of the actual loss sustained, such an offer clearly being a nuisance settlement offer. The government conceded in its response to the taxpayer's original motion for attorneys' fees that the taxpayer had "suibstantially prevailed" as required by the statute. but contended that its position had been "substantially justified".

The Tax Court issued a separate opinion [92 T.C. 192] stating that litigation costs would not be awarded in this case based on its analysis of "substantial justification", by which it arrived at the conclusion that the Government had met the standard required to warrant taking a taxpayer into the litigation stage instead of negotiating a settlement.

On appeal the Eighth Circuit confirmed the lower court opinion with only a brief reference to the rational.

REASONS FOR GRANTING PETITION

1. The lower court erred by applying a standard of "reasonable justification" as opposed to the proper standard of "substantial justification". The lower court, in effect, has set a standard which equates "no authority" as being sufficient to meet the Equal Access to Justice Act requirement of "substantial justification" and has refused to consider the agency conduct prior to the filing of the tax court petition as was required prior to the most recent law change. Equal Access to Justice Act, Sec. 1551, Pub. L. 99-514, 100 Stat. 2742 (Tax Reform Act of 1986).

A chronic problem which Congress has attempted to correct is the failure of the I.R.S. to protect American citizens from intolerable treatment by I.R.S. employees, as well as aggressive threats of litigation made by the I.R.S. to those who did not cooperate. Reliance upon self-regulation and self-discipline by the I.R.S. has not been effective. As was observed by the U.S. Supreme Court in U.S. v. Caceres, 440 U.S. 741 (1979):

> "With respect to I.R.S. officials' enthusiasm for self-discipline before and during the Senate investigation, Senator Long stated that 'generally speaking, they have found wrongdoing only when the subcommittee has pointed directly and explicitly to it.' S. Res. 39 Hearings 1000, 118."
>
> "Since that investigation, the agency's performance has remained less than exemplary."

In this case numerous requests for intervention were made and on each occasion where a request for a Congressional inquiry into the agency's conduct was made, the I.R.S. presented the repeated conclusion that "they have found their behavior to be totally appropriate."

Congress enacted the Equal Access to Justice Act (EAJA) in 1980 and Section 7430 of the Internal Revenue Code made the award of attorneys fees applicable to Tax Court cases commencing after February 28, 1983. Unfortunately, there was such a strained interpretation of Section 7430 from its inception, that Congress was forced to reenact it in the 1986 Tax Reform Act along with new language directing that the standard of "reasonable justification" be replaced by a higher burden of proof ("substantial justification"), in order for the government to avoid an award of litigation costs to the taxpayer. It is this standard which is being considered in the present case.

The standard of "substantial justification" is the one chosen to identify a situation in which the I.R.S. has an acceptable level of justification to force a taxpayer to litigate an issue. If, on the other hand, pursuing an issue into the courts is not substantially justified, the I.R.S. should simply acknowledge a lack of genuine authority for the position adopted by the revenue agent, and concede the issue. Note that where the I.R.S. wants the law to be changed, they need only address the issue to Congress (as they did in this case within 30 days of the adverse tax court decision). They are precluded from subjecting taxpayers to the financial and emotional burden of litigation, merely to push forward with the creation of new case law. The courts must weigh the personal costs to the

taxpayers involved in this process heavily, treating them almost as a protected class. Note that without special limitations, any litigant has the freedom and right to pursue a case in hopes of making new law. But note also that the I.R.S. does have special limitations, and is prevented from doing this.

The best way to juxtapose the intended interpretation of the phrase "substantial justification" with the common misinterpretation by the courts of "reasonable justification", is to quote Justice Brennan in Pierce v. Underwood, S.Ct., 86-152, decided June 27, in his concurring opinion (p. 2, Section I):

> The Senate Judiciary Committee considered and rejected an amendment substituting the phrase "reasonably justified" for "substantially justified." S. Rep., at 8. Clearly, then the Committee did not equate "reasonable" and "substantial"; on the contrary, it understood the two terms to embrace different burdens. "Reasonable" has a variety of connotations, but may be defined as "not absurd" or "not ridiculous." Webster's New Third International Dictionary 1892 (1976). Even at its strongest, the term implies a position of some, but not necessarily much, merit. However, as we have seen, "substantial" has a very different definition: "in substance or in the main." Thus, the word connotes a solid position, or a position with a firm foundation. While it is true "reasonable" and "substantial" overlap somewhat (substantial at its weakest and reasonable at its strongest) an overlap is not an

identity. Therefore, although Congress may well have intended to use "substantial" in its weaker sense, there is no reason to believe, and substantial reason to disbelieve (as I will discuss below), that Congress intended the word to mean "reasonable" in its weaker sense.

The underlying problem with the Court's methodology is that it uses words or terms with similar, but not identical, meanings as a substitute standard, rather than as an aid in choosing among the assertedly different meanings of the statutory language. Thus instead of relying on the legislative history and other tools of interpretation to help resolve the ambiguity in the word "substantial," the Court uses those tools essentially to jettison the phrase crafted by Congress. This point is well illustrated by the Government's position in this case. Not content with the term "substantially justified," the Government asks us to hold that it may avoid fees if its position was "reasonable." Not satisfied even with that substitution, we are asked to hold that a position is "reasonable" if "it has some substance and a fair possibility of success." Brief for Petitioner 13. While each of the Government's successive definitions may not stray too far from the one before, the end product is significantly removed from "substantially justified." I believe that Congress intended the EAJA to do more than award fees where the Government's position was one

> having no substance, or only a slight possibility of success; I would hope that the Government rarely engages in litigation fitting that definition, and surely not often enough to warrant the $100 million in attorneys fees Congress expected to spend over the original EAJA's 5-year life.

Brennan concludes his concurring opinion in which Marshall and Blackmun join as follows:

> In sum, the Court's journey from "substantially justified" to "reasonable basis both in law and fact" to "the test of reasonableness" does not crystallize the law, nor is it true to Congress' intent. Instead, it allows the Government to creep the standard towards "having some substance and a fair possibility of success," a position I believe Congress intentionally avoided. In my view, we should hold that the Government can avoid fees only where it makes a clear showing that its position had a solid basis (as opposed to a marginal basis or a not unreasonable basis) in both law and fact. That it may be less "anchored" than "the test of reasonableness," a debatable proposition, is no excuse to abandon the test Congress enacted."

The case being considered presents a practical illustration of the pitfalls encountered by the judiciary in applying the new standard, termed "substantially justification". Although this is clearly a case where an application of Section 7430 should result in an award to the taxpayer of litigation costs, the court has failed to

apply the standard properly.

Aside from the well documented abuses of the taxpayer by I.R.S. employees prior to litigation (which will be discussed separately), the I.R.S. has pursued the case relentlessly through the court system in an effort to make new law through litigation, even though the original premise lacked foundation either in case law or statute. The efforts were conducted at the taxpayer's expense, and thus it is an extremely appropriate case for an award of litigation costs, since the taxpayer met all other elements listed by the statute as prerequisite for such an award. The element which is at issue is whether the I.R.S. has litigated a case when it lacked "substantial justification".

An examination of the Tax Court's opinion reveals how the term "substantial justification" was incorrectly interpreted, in the very way which Brennan described in his discussion above. The Tax Court rejected the Government's position on the main issue, which posed the question, whether the wash-sales rule included stock options. Rather than focus on this issue, it would be more enlightening to consider the tone maintained throughout the opinion.

For instance, the court observes that "the parties have not cited and we are not familiar with any case that decides whether an option is a security for such purposes; <u>the issue before us is one of first impression</u>." Thus, there was no basis in case law for the Government's position.

Also, the Court observes that "the legislative histories accompanying the 1921 and 1924 Acts offer no indication whatsoever that Congress intended the statutory wash sale

provision to disallow losses sustained on the sales of options." Thus, there was no evidence that the statute supported the Government's position.

Finally, although the Government was attempting to make an argument by analogy to other sections, this approach was rejected as a patent case of misguided logic, where the Government was trying to see something that just was not there. First, the Court showed an instance where a section specifically includes "any evidence of an interest in or right to subscribe to or purchase" stock", and then contrasted this with another section where "for purposes of section 351 I.R.C., stock rights or stock warrants are not included in the term 'stock or securities.'" Much of the opinion goes on to detail other intermediate instances where options are defined, excluded or not addressed throughout the code, to demonstrate that no analogy could possibly be drawn from one section to the next. In other words, the Government's argument was specious, as the Court's more intelligent examination of comparable code sections revealed. The Court emphasized its position by concluding "In short, there is no uniform rule under tax law whereby stock options definitely are included in or excluded from categorization as "stock or securities."

The Court even goes so far as to present an elementary lesson in statutory interpretation, in explaining to the Government the proper way to read a statute: "such a construction is required in order to maintain the internal consistency of the terms of section 1091 I.R.C., because identical words used in different parts of the same statute must be construed to mean the same thing if no contrary meaning is clearly shown." The Court also

discusses at length the concept of the "plain meaning" of a statute. Overall, it appears that the Government's argument contained such serious flaws, that the Court's opinion became an educational tool. Consider again Justice Brennan's description of "substantial" as a "word connotes a solid position, or a position with a firm foundation". The Government's position clearly did not impress the court as a solid one by any means.

It also appears that the Court actually presented the petitioner's case for litigation costs here, if Justice Brennan's words are to be given any weight at all. An examination of the Tax Court's opinion, provided in Appendix A, gives a wealth of support to the position that the Government did not meet the standard of "substantial justification" by any means.

Therefore, it comes as a disappointment that the Court back peddles at a later date when arriving at its decision to deny the request for litigation costs. At this time, the Court either forgot its original words, or it expressed an opinion based on its misunderstanding of the meaning of the standard "substantial justification", the latter being the more likely explanation.

The Court now reasoned that the argument made by the Government had been at least "rational". Consider again Brennan's description of "reasonable" (the incorrect standard) as "not absurd". In keeping with Brennan's approach of finding the definition placed in dictionaries, one has been consulted regarding the adjective "sound" which the court also used to describe the Government's position. Sound means "based on valid reasoning." Reasonable means "in accordance with reason". Webster's

New World Dictionary, Second College Edition. It appears that the standard which the court applied below, was that of "reasonable justification."

<u>The standard of "reasonable justification" is not the correct standard</u>. The correct standard, "substantial justification", requires a considerably more solid basis for litigation. The basis for the Government's position in this case, even if considered exclusively through the Court's analysis of it, does not even approach "substantial justification." The petitioners in this case do not really need to promote their opinion regarding what standard the Government achieved, because the trial court has already made this quite clear.

The Government's position was "reasonably justified", not "substantially justified." In keeping with the terms of the statute, the petitioners should therefore be awarded litigation costs.

On appeal to the Eighth Circuit, the Tax Court opinion on this issue was upheld, with a brief, but revealing statement:

> We agree that the Commissioner's position in this litigation . . . had a reasonable basis in law and was therefore substantially justified. See <u>Appendix</u>.

As with the Tax Court analysis, while the Appeal Court's definition was that of "reasonable justification", it then used the label, "substantial justification". <u>By naming the standard "substantial justification", it became so</u>. That is wrong.

At both the Tax Court level and at the Appeals Court level, the standard of substantial justification has become confused and distorted. Essentially, what is needed at this time is a clear enunciation of the correct analysis to be applied in determining whether the Government has met its burden of substantial justification for its litigation in order to avoid an award of litigation costs. A clarification of this judicial standard would allow the proper operation of a series of legislative enactments directed at protecting the taxpayer against any unnecessary financial burden where it appears that the Government was not standing on absolute solid ground in bringing the taxpayer through the ordeal of litigation instead of negotiating a reasonable settlement.

The second half of the determination of whether to award litigation costs involves conduct prior to litigation.

Perhaps the best way to summarize the feelings of the many individuals who are now claiming they have been bullied and terrorized by certain I.R.S. employees in this case, is to present the affidavit of Mr. Gantner's accountant, who prepared the tax returns involved, recounting his ordeal and that of others:

> In my entire career I have never observed such reprehensible conduct exhibited by an agent of the Internal Revenue Service as was displayed by Mr. Robert Erickson when I represented David E. and Sandra Gantner in the audit of their tax returns for the years 1980 and 1981. Mr. Erickson not only browbeat the clients and myself but he went so far as to push his way

into the taxpayer's home. He produced his badge to the Gantner's 11 year old daughter and used that as the authority to make this unannounced inspection. In 23 years I have never heard of such conduct.

With respect to the $200 penalty he proposed against me as a tax preparer, he proposed this because I had filed D & L Properties as a partnership (which it was) as opposed to a corporation and intimated that I was somehow guilty of <u>fraud</u> but he was going to let me off easy. In any event the fashion in which it was raised and the manner in which it was resolved was most unreasonable and totally unjustified. I met with the Revenue Agent and his supervisor, Mr. Robert Cyza, and Mr. Mark Arth was also present. Apparently the Revenue Agent's contention was that it was improper for D & L Properties to file partnership returns as opposed to corporate returns and the Revenue Agent wanted to assess me a penalty of $100 per return or something along those lines. It was totally proper to have filed those returns in that fashion at the time the returns were filed and that position has once again been sustained by a recent Supreme Court decision. I was adamant that the Revenue Agent deserved nothing and I would not pay him the money he was demanding.

After a protracted meeting and on the advice of Mr. Arth, I agreed to pay the Revenue

> Agent $100. The primary purpose for the payment was not that I agreed with him in any way, shape or form but merely because my counsel indicated that the fees to represent me in this matter would be in excess of $100 per hour and that it would be just cheaper for me to pay the $100 to the Revenue Agent to have him go away. I was incensed and considered it to be nothing short of extortion.
>
> It appears that this was the position we were constantly taking with this particular Agent. In other words, it was not merely what the Agent was doing but also the manner in which he did it. The Agent constantly took a strained position of both the Internal Revenue Code and the Internal Revenue Agent's code of conduct in an attempt to maximize the amount of revenue possible.
>
> In my opinion, the Agent behaved in an unreasonable fashion and his conduct was totally unjustified throughout the entire course of these proceedings.

The affiant describing these incidents is not the petitioner, and did not have thousands of dollars at stake. He is a member of the accounting profession, a group that has perhaps more opportunity to develop a sense of how the I.R.S. normally conducts its activities than any other group. Accountants deal with tax <u>compliance</u> work throughout their careers and generally have a good rapport with the I.R.S. However, if this opinion is still not objective enough, consider the affidavit of Robert Cyza,

the agent's supervisor, who attending the meeting described:

> My main purpose in being at the meeting was to act as a mediator in a situation which I felt was getting out of control. I felt that the Agent had lost perspective with respect to the penalties and the issues being proposed.

The Government has not offered any vigorous arguments to dispute this version of events prior to litigation. Instead, their focus has been on preventing the court from considering the ordeal of the taxpayer up until the filing of this case. Again, to the taxpayer's dismay, the Tax Court swayed in favor of the Government in narrowly construing any reference to pre-litigation activity.

Yet it is clear that the Supreme Court intended there to be a much broader consideration of administrative actions well in advance of actual litigation. Again, to quote Brennan in Pierce, supra:

> Concerned that the Government, with its vast resources, could force citizens into acquiescing to adverse Government action, rather than vindicating their rights, simply by threatening them with costly litigation, Congress enacted the EAJA, waiving the United States' sovereign and general statutory immunity to fee awards and created a limited exception to the "American Rule" against awarding attorneys fees to prevailing parties. (p. 2)

Even the Internal Revenue Manual enunciates this

sentiment when outlining proper conduct for revenue agents charged with the settlement of cases prior to litigation.

> Section 8721 Judicial Attitude Toward Settlement. The judicial attitude is one which . . . is objective and impartial. Any approach which contemplates a maximum possible result in favor of the Government or a deficiency in every case is incompatible with judicial attitude and the Appellate mission.

The 8th Circuit Court decisions in both Wickert v. Commissioner, 842 F.2d 1005, (8th Cir. 1988) and Berks v. United States, 860 F.2d 841 (8th Cir. 1988) clearly state that the law does permit inquiry into the administrative action or inaction as well as the government's in-court litigating position.

Finally, this petition for writ of certiorari should be granted because the question presented is of substantial importance to the resolution of a troublesome issue. The lower courts have continued to pursue a systematic and pervasive course of conduct which misinterprets the plain language of both the statute and the case law mandated by this Supreme Court to protect weaker citizens from oppressive conduct by the Sovereign.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

David E. Gantner and
Sandra L. Gantner,

Appellants,

v.

Commissioner of Internal
Revenue,

Appellee.

No. 89-1952

David E. Gantner and
Sandra L. Gantner,

Appellees,

v.

Commissioner of Internal
Revenue,

Appellant.

No. 89-1953

Before WOLLMAN and MAGILL, Circuit Judges, and BOGUE*, Senior District Judge.

*The HONORABLE ANDREW W. BOGUE, United States Senior District Judge for the District of South Dakota, sitting by designation.

WOLLMAN, Circuit Judge.

This case is before us on cross appeals by David E. and Sandra L. Gantner and the Commissioner of Internal Revenue (Commissioner). The Commissioner appeals the Tax Court's decision allowing the Gantners to deduct the loss from the sale of stock options on their joint federal income tax return. The Gantners appeal the Tax Court's rulings that: (1) denied deductions and tax credits for computer equipment; (2) assessed interest for underpayment of taxes; and (3) denied litigation costs. [1] We affirm.

I. APPEAL BY COMMISSIONER

During 1980, David E. Gantner [2] purchased and sold options for stock, although he neither acquired nor sold the underlying shares of stock. Gantner was not a licensed broker, but purchased and sold stock options through a brokerage firm. On November 20 and December 2, 1980, he bought a total of 100 options to purchase stock of Tandy Corporation for $90,399.70. Each option entitled him to purchase 100 shares of Tandy at $100 per share and each option was to expire in January 1981. On December 3, 1980, Gantner sold the options for $51,490, thus incurring a loss of $38,909.70. Also on December 3, 1980, he purchased an additional 100 options.

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[1] The Tax Court's opinions are reported in Gantner v. Commissioner, 91 T.C. 713 (1988), and Gantner v. Commissioner, 92 T.C. 192 (1989).

[2] Sandra L. Gantner is a party principally because she filed a joint income tax return with her husband for the taxable years in issue.

Gantner deducted a loss of $38,909.70 on his 1980 income tax return. Following an audit, the Commissioner disallowed the loss based on section 1091 of the Internal Revenue Code, the "wash sale" provision, as in effect during 1980. See 26 U.S.C. Section 1091 (1954). [3] Based on that adjustment, the Commissioner asserted a deficiency in the Gantners' joint income tax for 1980. Upon review, the Tax Court held in favor of the Gantners, finding that section 1091 does not preclude deductions for loss from the sale of options. The Commissioner appeals.

The Commissioner contends that the Gantners' options to purchase stock are "securities" for purposes of the wash sale provision of section 1091 and therefore the Gantners' loss should not be allowed. 26 U.S.C. Section 1091(a) disallows deductions of losses from wash sales of stock or securities

> [i]n the case of any loss claimed to have been sustained from any sale or other disposition of shares of stock or securities where it appears that, within a period beginning 30 days before the date of such sale * * * and ending 30 days after such date, the taxpayer has acquired * * * or has entered into a contract or option so to acquire, substantially identical stock or securities[.]

(Emphasis added.) The Commissioner asserts that tax law and securities law generally define the term "securities" to

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[3] The Internal Revenue Code of 1954 has since been renamed the Internal Revenue Code of 1986.

include options or rights to purchase stock.

We review the Tax Court's conclusions of law de novo. Mangels v. United States, 828 F.2d 1324, 1326 (8th Cir. 1987). The Tax Court held that the plain meaning of section 1091(a) is that an option to acquire stock is not equivalent to "stock or securities" and that a loss sustained from a sale of stock options is not a loss within the plain meaning of section 1091.

Section 1091 does not define what constitutes a "security" for purposes of section 1091. Neither the Commissioner nor the Gantners cite case law determining whether an option is a security under section 1091.

The reacquisition event in section 1091 requires the taxpayer to have "acquired * * * or ha[ve] entered into a contract or option so to acquire, "substantially identical stock or securities. This phrase, through the use of the connecting word "or" indicates that a contract or option to purchase stock is not the same as an acquisition of stock. We hold that an option to purchase stock is not a "share" of a "stock or security" under the plain language of section 1091. We therefore need not look to the legislative history or to definitions of "security" found elsewhere in tax law and securities law. The Tax Court's decision allowing the Gantners to deduct losses from the sale of stock options under section 1091 [4] is affirmed.

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[4] Section 1091 has been amended to include the sentence: "For purposes of this section, the term 'stock or securities' shall, except as provided in regulations, include contracts or options to acquire or sell stock or securities." The amendment is prospective and inapplicable to the present case.

II. APPEAL BY GANTNERS

Computer Expenses

The Gantners appeal the Tax Court's ruling denying deductions and tax credits for computer equipment.

In addition to his involvement in the stock market, David E. Gantner was president and a shareholder of North Star Driving School, Inc. during 1980 and 1981. North Star was in the business of selling driving lessons. Gantner and Lee B. Whited each owned fifty percent of the stock of North Star and were equally compensated.

Beginning in 1979, Gantner purchased computer equipment and software. All but one of the computers were used at North Star, which made no rental payments to Gantner for use of the computers. There was no written agreement between Gantner and Whited concerning the computers. The Gantners claimed deductions and investment credits for the computer items on their amended 1980 and their 1981 tax returns. The Commissioner disallowed all the deductions and credits, finding that ninety-five percent of the computer expenses were connected with the business of North Star. The court also found that the expenses were not incurred by Gantner as ordinary and necessary expenses of his trade or business as an employee of North Star but were contributions to the capital of North Star made by him in his capacity as a fifty-percent owner.

On appeal, Gantner asserts that he purchased the computers pursuant to an oral agreement between North

Star and the officers that obliged him to purchase his own equipment for his position at North Star. The Gantners rely on Lockwood v. Commissioner, 29 T.C.M. (CCH) 618 (1970), to support their contention that they should be able to claim the computer expenses on their individual tax returns. In Lockwood, the court found that the taxpayer was required to incur expenses on behalf of the corporation without expectation for reimbursement and that his expenses were deductible as ordinary and necessary expenses of serving as an officer of his trade or business. In Lockwood, however, the taxpayer was not a shareholder of the corporation, as Gantner is of North Star.

A corporation is treated as a separate entity from its shareholders for tax purposes. Moline Properties, Inc. v. Commissioner, 319 U.S. 436, 438-39 (1943). A shareholder is not entitled to a deduction from his individual income for payment of corporate expenses. Deputy v. du Pont, 308 U.S. 488, 494 (1940). A shareholder cannot convert a business expenses of his corporation into a business expenses of his own simply by agreeing to bear such an expense, Harding v. Commissioner, 29 T.C.M (CCH) 789 (1970), or by failing to seek reimbursement. Podems v. Commissioner, 24 T.C. 21 (1955).

Gantner did not meet his burden of proving that he was required to purchase the computer. The purchase of computer items cannot be converted into a personal business expense simply by agreeing with officers of North Star that they should be so treated or by failing to seek reimbursement. Since Gantner was a shareholder of North Star and therefore had a corresponding interest in the success of the corporation, we consider his expenditures

for computer equipment to be contributions to the capital of North Star. Accordingly, we affirm the Tax Court's decision denying Gantner deductions and tax credits for computer expenses.

Interest

The Gantners next assert that the Tax Court erroneously imposed an increased interest rate for substantial underpayment of taxes attributable to tax motivated transactions.

The Tax Court found, and the Gantners do not dispute, that they incurred an income tax deficiency for 1980 by making gold commodity futures tax straddle transactions that were tax motivated. See 26 U.S.C. Section 6621(c). Part of that liability remained unpaid as of December 31, 1984. Under 26 U.S.C. Section 6621(c), interest accrues at a rate twenty percent higher than the normal rate for deficiencies from tax motivated transactions not paid by December 31, 1984.

The Gantners seek to be excused from paying the interest because an Internal Revenue agent to whom they had submitted an amended 1980 tax return in September 1983 failed to file the return. In March 1984, the Commissioner notified the Gantners that the amended 1980 return had not been filed. Thereafter, they submitted a copy of their amended 1980 return directly with the Internal Revenue Service in June 1984. The Tax Court held that "any act of the revenue agent in filing or not filing" the Gantners' amended 1980 return would have "no effect on the accrual of interest." Gantner v. Commissioner, 91 T.C. 713, 732 (1988).

We agree with the Tax Court that because the Gantners did not pay the total underpayment attributable to the gold straddles on or before December 31, 1984, they are liable for increased interest pursuant to section 6621(c).

Litigation Costs

The Gantners also appeal the Tax Court's decision denying them litigation costs. Having prevailed on the issue of the sale of options, the Gantners asked the Tax Court to award them litigation costs under 26 U.S.C. section 7430. To recover litigation costs under section 7430, Gantner must show, inter alia, that "the position of the United States in the proceeding was not substantially justified." Gantner v. Commissioner, 92 T.C. 192, 198 (1989).

We agree that the Commissioner's position in this litigation--asserting that options are securities for purposes of section 1091--although ultimately rejected by the Tax Court and this court, had a reasonable basis in law and was therefore substantially justified. We therefore affirm the Tax Court's denial of litigation costs to the Gantners.

CONCLUSION

The Tax Court's decision is affirmed.

A true copy.

Attest: Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

91 T.C. No. 47

UNITED STATES TAX COURT

DAVID E. AND SANDRA L. GANTNER, Petitioners v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 2222-86 Filed September 29, 1988

Held: Losses on sales of stock options are not subject to disallowance as wash sales pursuant to sec. 1091 because options are not "stock or securities" within the meaning of sec. 1091. Held: P is not entitled to deductions and investment credits relating to computers used by his employer, a corporation in which P is a 50% shareholder. Held: P is not entitled to deductions for a home office and other expenses. Held: Regardless of the date of assessment, P is liable for increased interest pursuant to sec. 6621(c) because a substantial underpayment of taxes attributable to tax motivated transactions existed after December 31, 1984.

Mark Arth, for the petitioners.

Genelle Forsberg and Douglas W. Hinds, for the respondent.

WELLS, Judge: Respondent determined deficiencies in and additions to petitioners' 1980 and 1981 Federal income taxes as follows:

Year	Deficiency	Additions to Tax Sections [5]			
		6651(a)(1)	6653(a)	6653(a)(1)	6653(a)(2)
1980	$63,027.02	$4,848.79	$5,241.60	--	--
1981	4,433.00	--	--	248.10	*

*50% of the interest due on $4,433

Respondent also determined that petitioners are liable for the increased rate of interest pursuant to section 6621(c).[6]

After settlement by the parties of several issues, the following remain for our decision: (1) whether a loss on the sale of stock options should be disallowed pursuant to the wash sale provisions of section 1091; (2) whether deductions and investment credits relating to computer equipment are allowable; (3) whether deductions for an office in petitioners' residence are allowable; (4) whether other business expenses for 1981 are allowable; and (5) whether there was an underpayment of petitioners' 1980 income tax attributable to tax motivated transactions so that petitioners are liable for the increase rate of interest

[5] Unless otherwise indicated, all section and Code references are to the Internal Revenue Code of 1954 as in effect during the relevant years, and all Rule references are to the Tax Court Rules of Practice and Procedure.

[6] Subsec. (d) of sec. 6621 was redesignated subsec. (c) and amended by the Tax Reform Act of 1986, Pub. L. 99-514, sec. 1511(c)(1)(A)-(C), 100 Stat. 2744. We use the reference to section 6621 as redesignated and amended.

pursuant to section 6621(c).

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation and attached exhibits are incorporated herein by this reference. Petitioners resided in Bloomington, Minnesota, when they filed their petitions.

During 1980 and 1981 petitioner David E. Gantner ("petitioner") was president and a shareholder of the North Star Driving School, Inc. ("North Star"). North Star was in the business of selling driving lessons, and it provided students with classroom instruction and behind-the-wheel training. During the years in issue, petitioner also was president of the Driving School Association of the Americas ("DSAA"), a trade association consisting of approximately 225 dues-paying members, but in effect representing approximately 3300 driving schools in the United States and Canada. Petitioner's activities in DSAA required only a "token amount" of his time, including attendance at two or three meetings per year of the board of directors. Petitioner also served as a delegate to international driving instruction conventions held in Germany and Austria in 1980 and 1981, respectively.

Petitioner and Lee Whited each owned 50 percent of the stock of North Star, and each received compensation from North Star in the amounts of $37,874 and $38,369 in 1980 and 1981, respectively. Petitioner generally was responsible for the business aspects of North Star such as payroll, other disbursements, and marketing, and Mr. Whited generally was responsible for the operational aspects such as hiring, training and supervising the driving instructors. The majority of North Star's students were of high school age, so the principal activities of the driving

school took place from about 3:00 p.m. until the early evening hours. Petitioner usually performed his duties for North Star during the afternoon and early evening hours, as well as on weekends. Also, driving instructors sometimes would stop by petitioner's home at night to drop off receipts collected from the students and to pick up contracts that petitioner had brought to them from the North Star office.

In addition to his duties with North Star and DSAA, petitioner also devoted a substantial part of the morning and early afternoon hours on weekdays to monitoring the stock market. Those times comported with the hours during which the New York Stock Exchange and the American Stock Exchange were open--9:00 a.m. until 3:00 p.m., Minnesota time. During 1980 petitioner's stock market transactions consisted of purchases and sales of only call options for stock; he neither acquired nor sold actual shares of stock.

Petitioner was not a licensed broker, so he purchased the stock options through the Minneapolis office of the brokerage firm Shearson Loeb Rhoades, Inc. ("Shearson"). His account statements from Shearson reflect the following activity in 1980:

	Sales	Purchases
JAN	3	3
MAR	4	2
APR	0	1
MAY	1	3
JUN	4	4
JUL	7	5
AUG	10	5
SEP	6	8
OCT	6	6
NOV	5	3
DEC	3	2
YEAR TOTAL	49	42

Petitioner bought 1330 options in his 42 purchase transactions and sold 1255 options in his 49 sale transactions. [7] In 1980 petitioner's net sales proceeds from stock options (after commissions) amounted to $1,043,978.76, and his total purchases (including commissions) amounted to $871,408.49.

Due to the high volume of his trading activity, petitioner received a 30 percent discount on commission fees from Shearson. In fact, one of the two Shearson brokers used by petitioner in 1980 described petitioner as "the most active customer I've ever had." Petitioner did not rely on brokers for recommendations to buy or sell options; he depended on the brokers only for execution of the trades and for information, e.g., the most current

[7] The parties stipulated that petitioner both bought and sold 1255 options during 1980, but our examination of petitioner's account statements indicates that the stipulation is incorrect in regard to the number of options purchased. See Jasionowski v. Commissioner, 66 T.C. 312, 318 (1976).

market prices.

The majority of petitioner's 1980 purchases and sales of call options were for stock in Tandy Corporation ("Tandy"). Included among petitioner's purchases were the following calls for Tandy at $100 per share, expiring in January 1981 ("JAN 100s"): [8]

Date Purchased	Number	Cost
11/20/80	15	$15,979.35
11/20/80	35	38,160.29
12/02/80	50	35,260.06

On December 3, 1980, petitioner bought 100 JAN 100s at a cost of $61,063 and sold 100 JAN 100s for $51,490. On his 1980 tax return, petitioner reported a loss of $38,909.70 from the sale of the Tandy options. The loss was computed using a cost basis of $90,399.70 (total cost of the purchases on November 20 and December 2) and a sales price of $51,490.

In the notice of deficiency, respondent disallowed that loss for 1980 based upon the wash sale provisions. Respondent added the amount of the disallowed loss to the basis of the options purchased on December 3, 1980, and allowed petitioner an increased 1981 loss upon the disposition and expiration of the Tandy options in January 1981.

[8] A single call represented an option to purchase 100 Tandy shares for $100 per share.

In addition to his stock option trades, petitioner purchased and sold commodities futures through a "managed account" administered by Shearson's Chicago office. The managed account gave the broker in Chicago discretionary authority to make trades for the account without any participation by petitioner in the decisions. Petitioner's use of such a discretionary account for his commodity transactions was in direct contrast to his stock option account in which he alone made the decisions to buy or sell.

Among petitioner's commodity transactions in 1980 were straddles using gold contracts. Prior to trial, the parties entered into a closing agreement for the disallowance of short term capital losses claimed on petitioners' 1980 tax return for "gold commodity futures tax straddles transactions" in the amount of $253,350. In September 1983, petitioners prepared an amended 1980 tax return reflecting the disallowance of those commodities transactions. The tax liability, as reflected on that amended return, was $40,329. As of the date of trial, petitioners had made the following payments to apply against their 1980 Federal tax liability:

1980 withholding, net of amounts refunded	$ 1,319
11/6/84	500
12/31/84	20,000
10/17/84	43,929
10/21/85	8,199
	$73,947

In 1979, 1980 and 1981, petitioner purchased various items of computer equipment and computer software. The computers were used by North Star for payroll, form

letters and mailing lists, scheduling students and instructors, and other business purposes. Petitioner, rather than North Star, paid for the computer items because North Star was short of cash at the time. The computers also were used by petitioner to maintain information relating both to DSAA and to petitioner's stock options and commodity futures.

All but one of the computers were located in the North Star offices. One computer was kept in a room in petitioner's home and could interface with the computers at the North Star offices via a telephone modem located in the home. The majority of petitioner's use of the computers took place while he was in the North Star office; however, he sometimes used the computers while at his home. During 1979 through 1981, North Star had no rental agreement with petitioner, and North Star made no payments to petitioner for its use of the computer items. There was no written agreement between petitioner and Mr. Whited with respect to the computer items.

On their amended 1980 tax return, petitioners claimed deductions and investment credits relating to the computer items as follows:

Depreciation	$9,715.41
Expenses for Repairs and Supplies	1,876.41
Investment Credit for items purchased in 1979 and 1980	1,755.00

On their 1981 tax return, petitioners claimed deductions and investment credits for computer items as follows:

Depreciation	$6,980.49
Expenses for Supplies and Repair	843.36
Investment Credit	225.61

On their 1980 and 1981 tax returns, petitioners claimed additional deductions and credits as follows:

Expenses of Office in the home	$ 285.81	$ 285.81
Depreciation on a Honeywell Security System in the home	147.04	--
Investment Credit on the Honeywell Security System	183.87	--
Unreimbursed Expenses as DSAA President	2,154.71	1,111.83

In the notice of deficiency, respondent disallowed all of the petitioners' claimed deductions and credits relating to the computer items, the home office, the Honeywell system, and the DSAA expenses. Petitioners have conceded the nondeductibility of the DSAA expenses claimed for 1980, but they still contest the disallowance of the other items.

OPINION

Wash Sale

The first issue is whether the loss from petitioner's November and December trades of the Tandy calls should be disallowed for 1980 as a wash sales pursuant to section 1091. REspondent has not suggested that any common law wash sale doctrine should apply in the instant case. Cf. Shoenberg v. Commissioner, 77 F.2d 446 (8th Cir. 1935), affg. 30 B.T.A. 659 (1934); Horne v. Commissioner, 5 T.C. 250 (1945). See also Cottage Savings Association v. Commissioner, 90 T.C. 372, 392-394 (1988). Respondent's position is based solely ont he applicability of section 1091 to the facts before us. As in effect in 1980, section 1091(a) provided as follows:

SEC. 1091. LOSS FROM WASH SALES OF STOCK OR SECURITIES.

(A) DISALLOWANCE OF LOSS DEDUCTION.--In the case of any loss claimed to have been sustained from any sale or other disposition of shares of stock or securities where it appears that, within a period beginning 30 days before the date of such sales or disposition and ending 30 days after such date, the taxpayer has acquired (by purchase or by an exchange on which the entire amount of gain or loss was recognized by law), or has entered into a contract or option so to acquire, substantially identical stock or securities, then no deduction for the loss shall be allowed under section 165(c)(2); nor shall such deduction be allowed a corporation under section 165(a) unless it is a dealer in stocks or securities, and the loss is sustained in a transaction made in the ordinary course of its business.

We have no doubt that petitioner's Tandy call transactions in November and December fall within the ambit of section 1091 if the Tandy options are "shares of stock or securities." Petitioner purchased 100 calls on November 20 and December 2, he sold 100 identical calls on December 3, and he purchased 100 identical calls on December 3. In short, petitioner's position was identical at the beginning of December 3 as at the beginning of December 4--he owned 100 Tandy JAN 100 calls-- and the repurchase took place within 30 days (actually, the same day) of the disputed loss sale.

Petitioners assert, however, that the Tandy options are not "shares of stock or securities" as those terms are

used in section 1091. Petitioners also assert that petitioner was in the trade or business of trading options so that the loss is allowable under section 165(c)(1), not section 165(c)(2); therefore, section 1091 does not apply to him. The arguments are disjunctive, so a finding for petitioners on either argument would cause section 1091 to be inapplicable to the loss on the Tandy options.

Respondent counters that (1) the options are securities subject to loss disallowance under section 1091; (2) petitioners' assertion that petitioner was in the trade or business of trading options was not timely and should not be considered by the Court; and (3) even if the trade or business issue was raised timely, petitioner's buying and selling of stock options did not rise to such a level that he was either a dealer or trader--petitioner was merely an investor.

Neither Code section 1091 nor the regulations thereunder contain a definition of what constitutes a "security" for purposes of section 1091.[9] In addition, the parties have not cited and we are not familiar with any case that decided whether an option is a security for such purposes; the issue before us is one of first impression. Other sections of the Code contain the term "stock or securities," but stock options are not treated uniformly in all those sections. For example, section 1236(c) defines

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[9] Cases have held that commodity futures contracts and certificates of membership in the New York Coffee and Sugar Exchange are not securities for purposes of the predecessor provision to section 1091. See Corn Products Refining Co. v. Commissioner, 16 T.C. 395, 399-400 (1951), affd. 215 F.2d 513 (2d Cir. 1954), affd. on other grounds 350 U.S. 46 (1955); Horn v. Commissioner, 5 T.C. 250 (1945).

the term "security" to include "any evidence of an interest in or right to subscribe to or purchase" stock in a corporation. On the other hand, "For purposes of section 351, stock rights or stock warrants are not included in the term 'stock or securities.'" Sec. 1.351-1(a)(1), Income Tax Regs. In short, there is no uniform rule under tax law whereby stock options definitively are included in or excluded from categorization as "stock or securities."[10] See Kramer, Taxation of Securities, Commodities, and Options, sec. 17.6(a), p. 17-10 (1986). We therefore shall focus on the terms of section 1091 itself to ascertain whether a stock option is a security.

By its terms, section 1091(a) requires two events before it can apply. There must be both (1) a sale or other disposition on which a loss was claimed, as well as (2) an acquisition of like property within 30 days of the date of the sale or disposition. The statute speaks in terms of the sale or disposition only of "shares of stock or securities;" however, the reacquisition event is described as occurring if "the taxpayer has acquired * * *, <u>or has entered into a contract or option so to acquire</u>, substantially identical stock or securities." (Emphasis supplied.) Implicit in that statutory language is that <u>a contract or option to acquire</u> stock or securities is not the same as an <u>acquisition of</u> stock or securities. To say that

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[10] This is in contrast to Federal securities law, which defines the term "security" specifically to include any put or call on stock. 15 U.S.C. secs. 77b(1) and 78c(a)(10) (1982). Prior to 1982 those definitions of "security" did not specifically include puts or calls, but did include a "warrant or wright to subscribe to or purchase" any security. 15 U.S.C. secs. 77b(1) and 78c(a)(10) (1981). See Act of October 13, 1982, Pub. L. 97-303, 96 Stat. 1409.

entry into a contract or option to acquire stock or securities is tantamount to the acquisition of stock and securities would be to render superfluous the above emphasized clause in section 1091(a). Such an interpretation would violate the cardinal rule of statutory construction that "effect shall be given to every clause and part of a statute" (Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932); Woods v. Commissioner, 91 T.C. 88 98 (1988); McNutt-Boyce Co. v. Commissioner, 38 T.C. 462, 469 (1962), affd. per curiam 324 F.2d 957 (5th Cir. 1963)(), and we decline to read that emphasized clause out of the statute. Thus, insofar as the reacquisition event is concerned, an option to acquire stock or securities surely is not equivalent to stock or securities. Extending that logic to the disposition event, a disposition of an option to acquire stock is not equivalent to a disposition of stock or securities. Such a construction is required in order to maintain the internal consistency of the terms of section 1091, because identical words used in different parts of the same statute must be construed to mean the same thing if no contrary meaning is clearly shown. See Sorenson v. Secretary of tReasury, 475 U.S. 851, 860 (1986); Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934); Gellman v. United States, 32 T.C. 1171, 1176 (1959). Thus, the plain meaning of section 1091(a) is that an option to acquire stock is not equivalent to :stock or securities" and a loss sustained from a sale or disposition of stock options is not a loss which comes within the plain meaning of section 1091.

Even though we have interpreted section 1091(a) on its face to exclude stock options from its ambit, we shall examine the history of section 1091 and its predecessor provisions to determine whether the intent of Congress is

contrary to the plain meaning of the words in the statute. See Jaske v. Commissioner, 823 F.2d 174, 176 (7th Cir. 1987), affg. a Memorandum Opinion of this Court; Segel v. Commissioner, 89 T.C. 816, 841 (1987); Huntsberry v. Commissioner, 83 T.C. 742, 747-748 (1984). The tax statutes have contained a provision substantially identical to section 1091 for over sixty years. The Revenue Act of 1924, ch. 234, 43 Stat. 253, 269-270, included the following provision:

DEDUCTIONS ALLOWED INDIVIDUALS

SEC. 214. (a) That in computing net income there shall be allowed as deductions:

* * *

> (5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business * * *. No deduction shall be allowed under this paragraph for any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition. * * * [Emphasis supplied.]

Except for the emphasized clause (which first

appeared in the 1924 Act), section 214(a)(5) of the 1924 Act is identical to the first statutory wash sale provision enacted by Congress--section 214(a)(5) of the Revenue Act of 1921, ch. 136, 42 Stat. 227, 240. [11] Legislative history to the 1924 Act does not address the addition into law of the emphasized clause, which was the first, and to date remains the only, reference to options in the wash sales provision. See H. Rept. No. 179, 68th Cong., 1st Sess. (1924), 1939-1 C.B. (Part 2) 168, 256; S. Rept. No. 398, 68th Cong. 1st Sess. (1924), 1939-1C.B. (Part 2) 266, 282; Conf. Rept. No. 844, 68th Cong., 1st Sess. (1924), 1939-1 C.B. (Partf 2) 300, 305-306. Furthermore, we are not aware of any subsequent legislative history that refers to options in the context of wash sales.

The Conference Report for the 1921 Act, Conf. Rept. No. 486, 67th Cong., 1st Sess. (1921), 1939-1 C.B. (Part 2) 206, 214, provides the most expansive explanation available of Congress' intent in enacting the wash sale provisions:

> The House bill provided that the taxpayer shall not be allowed any loss sustained <u>in any sale of shares of stock</u> where it appears that at or about the date of such sale the taxpayer has acquired identical property in substantially the same amount as the property sold, and that if such new acquisition is to the extent of part only of the identical property, then the amount of loss deductible shall be in proportion as the total amount of the property sold or disposed of bears

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[11] As enacted in 1921, section 214(a)(5) also contained a clause limiting its application to sales and dispositions made after the passage of the 1921 Act, but no such clause was included in the 1924 Act.

> to the property acquired. The Senate amendment extends the operation of the rule to cases where the acquisition of new property is within 30 days before or after the date of sale, but excepts from the operation of the rule of the House bill cases where the new property is acquired by bequest or inheritance, and brings within the operation of the rule cases where the new property is substantially identical with the property sold, and provides, in case the new acquisition is to the extent of part only of substantially identical property, in lieu of the proportion provided by the House bill, that only a proportionate part of the loss shall be disallowed. [Emphasis supplied.]

At first blush, that Conference explanation leads us to recall the comments of Judge Learned Hand:

> The words * * * merely dance before my eyes in a meaningless procession * * * [and] leave in my mind only a confused sense of some vitally important, but successfully concealed, purport * * *. [O]ne cannot help wondering whether to the reader [those passages] have any significance save that the words are strung together with syntactical correctness.

See Hand, "Thomas Walter Swan" 57 Yale L.J. 167, 169 (1947). Nevertheless, it is clear from that explanation that Congress, in enacting former section 214(a)(5), certainly did not contemplate the application of that statutory provision to losses on sales of options. The Conference Report spoke only in terms of losses from sales of stock, and the House and Senate Reports to the 1921 Act

described the wash provisions as applying only to "losses sustained in the sale of securities." H. Rept. No. 350, 67th Cong., 1st Sess. (1921), 1939-1 C.B. (Part 2) 168, 177; S. Rept. No. 275, 67th Cong., 1st Sess. (1921), 1939-1 C.B. (Part 2) 181, 191. In short, the legislative histories accompanying the 1921 and 1924 Acts offer no indication whatsoever that Congress intended the statutory wash sale provision to disallow losses sustained on the sales of options.

Congress' failure to contemplate the application of the statutory wash sale provision to sales of options likely is attributable to the lack of any significant market for resale of options in the 1920s, because it was not until 1973, when the Chicago Board Options Exchange began to trade in call options, that fungible stock options effectively were able to be bought and resold on public markets in the United states. See Loss, Fundamentals of Securities Regulation 252 (1983); Johnson, "Is It Better To Go Naked on the Street" A Primer on the Options Market," 55 Notre Dame Law. 7, 10-11 (1979). The fact that there was no ready resale market for stock options in 1921 and 1924 would explain why Congress did not then contemplate stock options being "stock or securities" for purposes of section 1091.

Moreover, Congress apparently has been aware of the growth of the options markets, as evidenced by its 1982 amendment of the 1933 and 1934 Securities Acts so as to include put and call options specifically within the definition of a "security" for purposes of those two Acts. See note 6, supra. In spite of that apparent awareness, however, Congress has not seen fit to bring losses on options specifically within the ambit of section 1091. In 1982, or at any other time for that matter, Congress could

have amended section 1091 just as it amended 15 U.S.C. sections 77b(1) and 78c(a)(10), namely, define the term "security" so as specifically to include put and call options. In short, the facts that (1) there is no legislative history to indicate that Congress ever has intended stock options to be "securities" within the meaning of section 1091, (2) there was no significant market for the resale of options when Congress first passed a statutory wash sale provision in the 1920s, and (3) Congress has not amended section 1091 so as to include stock options specifically within the purview of that statute, when taken together, lead us to conclude that Congress has never intended for losses on sales of stock options to be subject to disallowance under the statutory wash sale provision of 1091. That lack of legislative intent, together with our reading of the plain meaning of section 1091, requires a holding that section 1091(a) does not apply to disallow losses sustained on the sales of stock options. [12] We therefore hold for petitioners on this issue. [13] On account of such a holding, we need

[12] Such a holding comports with "the rule frequently stated by the Supreme Court that 'taxing acts are not to be extended by implication beyond the clear impact of the language used' and that 'doubts are to be resolved against the government and in favor of the taxpayer.' Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 93-94 (1934)." Larotonda v. Commissioner, 89 T.C. 387, 292 (1987). See also United States v. Merriam, 263 U.S. 179, 187-188 (1923); Gellman v. United States, 235 F.2d 87, 90 (8th Cir. 1956); Frankel v. United States, 192 F. Supp. 776, 777 (D. Minn. 1961), affd. 302 F.2d 666 (8th Cir. 1962); Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. Kelm, 104 F. Supp. 745, 747 (D. Minn. 1952), affd. 206 F.2d 831 (8th Cir. 1953).

[13] As we noted above, respondent has not suggested that any common law wash sale doctrine should apply to the instant case, and we take that as a concession by respondent that petitioner's loss is allowable if the provisions of section 1091 do not apply.

not reach the alternative issue of whether petitioner was engaged in the trade or business of trading options.

Computer Equipment

We next must decide whether, and to what extent, deductions and investment credits are allowed for the computer items. Petitioners have the burden of proof. Rule 142(a). It is evident that the majority of the use of the computers was dedicated to North Star. Furthermore, during the years at issue, there is no question but that North Star was a corporation engaged in substantial business activities whose existence cannot be disregarded. See Moline Properties, Inc. v. Commissioner, 319 U.S. 436, 438-439 (1943); Rink v. Commissioner, 51 T.C. 746, 752 (1969).

In order to be deductible, business expenses generally must be the expenses of the taxpayer claiming the deduction. Hewett v. Commissioner, 47 T.C. 483, 488 (1967). In that regard a corporation is treated as a separate entity from its shareholders for tax purposes. Moline Properties v. Commissioner, supra. It is also well established that a shareholder is not entitled to a deduction from his individual income for his payment of corporate expenses. Deputy v. duPont, 308 U.S. 488, 494 (1940); Rink v. Commissioner, 51 T.C. at 751. Such payments constitute either capital contributions or loans to the corporation and are deductible, if at all, only by the corporation. Deputy v. duPont, supra; Rink v. Commissioner, supra

Petitioners cite Lockwood v. Commissioner, T.C. Memo, 1970-141, as support for their deduction of the

expenses attributable to North Star's use of the computer items. Petitioners, however, misconstrue the facts of Lockwood. In Lockwood a taxpayer was an officer of Momex, Inc., but not a shareholder in that corporation. That taxpayer's wife, however, was a 25-percent shareholder in Momex, but not an employee thereof. There shareholders and officers of Momex agreed that the officers would pay out of their own pocket, without corporate reimbursement, certain travel and entertainment expenses incurred by them on behalf of Momex. The corporate officer was accompanied by his wife on certain trips for Momex, and the couple claimed deductions for the expenses of those trips. We held that the taxpayers were allowed a deduction for the portion of the expenditures attributable to the husband on the grounds that those were ordinary and necessary expenses of being a Momex officer. We disallowed deductions for the wife's expenses because she was an investor, not an employee of Momex, and she did not show that the expenses were ordinary and necessary expenses of managing or conserving her Momex stock. Lockwood does not support petitioners' position because the taxpayer in Lockwood who was allowed a deduction was not a shareholder in his employer corporation; there was no issue in Lockwood as to whether the allowed expenses might have been capital contributions. Lockwood thus is inapposite to the facts of the instant case.

Petitioners cite no other authority to support their deductions of the computer items used by North Star. Petitioners have not suggested how the computer expenses possibly might be deductible expenses related to petitioner's role as an employee of North Star. Cf. Gould v. Commissioner, 64 T.C. 132, 135 (1975). There was no

corporate resolution or requirement that petitioner, as an employee, incur those expenses. Indeed, it appears to us that petitioner purchased the computer items in his capacity as a shareholder who desired that the company became more profitable, and the stock therefore more valuable. See Koree v. Commissioner, 40 T.C. 961, 965-966 (1963). [14] Such payments are contributions to the capital of North Star and, if at all deductible, are deductible by North Star, not by petitioners.

Petitioner testified that the computers also were used to keep mailing lists for DSAA, as well as to keep track of his options and commodities futures. Petitioners have not offered a log or any other evidence to show what percentage of use of the computers was devoted to North Star and what was devoted to his other activities. We, however, believe petitioner's testimony that he used the computers for activities other than North Star. Therefore, bearing heavily upon petitioners, whose inexactitude is of their own making, we find that they are entitled to a deduction and investment credits for five percent of the use of the computers. [15] Cohan v. Commissioner, 39 F.2d 540, 544 (2d Cir. 1930); Browne v. Commissioner, 73 T.C. 723, 729 (1980).

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[14] See also Cedron v. Commissioner, T.C. Memo. 1986-89

[15] For purposes of this deduction and credit, it is immaterial whether petitioner's trading of options rose to the level of a trade or business. If he were in a trade or business, the computer expenses would be decutcible under section 162. If he were merely an investor, the expenses would be deductible under section 212. Investment credit similarly would be allowable in either event. Secs. 48(a)(1), 168(c)(1).

The parties disagree about the total amount of computer expenses incurred by petitioner during the years at issue. Respondent concedes that petitioner paid for depreciable computer items in the amounts of $3,382.95, $21,958.95, and $2,256.10 in 1979, 1980 and 1981, respectively. On their tax returns, petitioners used a higher cost basis for depreciation of those items, however, since petitioners have offered no evidence to support the higher bases, we deem them to have conceded the amounts in excess of those stipulated by respondent. Petitioners claimed depreciation and investment credit for the items purchased in 1979 as attributable to items first put into service in 1980. Respondent has not questioned the timing of the computer deduction and credit, and we deem him to have conceded that the 1979 and 1980 expenses relate to property placed in service in 1980.

Petitioners have not offered evidence to substantiate any of the expenses for computer supplies and repairs claimed for 1980 and 1981. Respondent, however, has stipulated that petitioner incurred expenses for repairs and supplies in 1981 in the amount of $843.36. Petitioners therefore are entitled to a deduction for five percent of those expenses, but have not shown their entitlement to any such expenses for 1980. Rule 142(a).

Last, respondent asserts that petitioner's computer purchases included software in the amounts of $397.95 and $2,256.10 for 1980 and 1981, respectively. Petitioners have not disputed those assertions, and we find that purchases in those amounts were for software. Rule 142(a). Investment credit is not allowed on computer software, so those amounts must be excluded from the basis of the section 38 property on which investment credit is available.

Ronnen v. Commissioner, 90 T.C. 74, 96-100 (1988).

In summary, we have found that petitioners are entitled to take deductions and credits for computer items to the extent of five percent of the following:

Depreciable basis--placed in service	1980	$25,341.90
	1981	2,256.10
Basis of Section 38 property	1980	24,943.95
Expenses of Supplies and Repairs	1981	843.36

Petitioners also claimed investment credit and depreciation for a security system installed in their home in 1981. Their briefs do not address the use or purpose of the system, and they have forwarded no evidence to substantiate any deductions or credits for costs of the system. We therefore deem them to have conceded the deductions and credit relating to the security system. Rule 142(a).

Home Office

Next, petitioners contend that they are entitled to a deduction for use of a room in their home as an office. Petitioners have the burden of proof on this matter. Rule 142(a). Section 280(a) provides that no deduction shall be allowed with respect to the use of a dwelling unit which is used by a taxpayer as his residence. Section 280A(c)(1) provides exceptions under which a deduction is allowed to the extent a portion of the home is used on a regular basis exclusively as (1) the principal place of business for any

trade or business of the taxpayer, [16] or (2) a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of business. In the case of an employee, however, those exceptions apply only if the exclusive use of the portion of the residence is for the convenience of the employer. Sec. 280A(c)(1).

Petitioners rely on Heineman v. Commissioner, 82 T.C. 5328 (1984), to support the home office deduction. Petitioners apparently overlook the first sentence of the opinion portion of that case, where we stated that "section 280A, relating to the use of a home as an office, is not applicable in this case because [the parties] agreed that the office was not a dwelling unit which was used as a residence within the meaning of section 280A(a)." 84 T.C. at 542. Heineman is thus inapposite to the instant case because there is no doubt that the house in which petitioner's "office" was located was used as petitioners' residence.

Petitioners contend that it was necessary for petitioner to have a home office so that he could meet with driving instructors at night and so that he could perform payroll functions and other duties for North Star. Petitioner maintains that he performed his North Star duties at his home because the North Star office was too noisy and he could not concentrate while there. As asserted in

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[16] For certain pre-1980 tax years, this first exception was worded so that a deduction was available for the use of a portion of the home "as the taxpayer's principal place of business." The change in the wording of section 280A(c)(1)(A) was made by an Act of December 29, 1981, Pub. L. 97-119, sec. 113, 95 Stat. 1635.

petitioners' brief, "The Petitioner requires solitude when conducting those affairs."

Petitioners' brief [17] states that the office in the home was used "exclusively as an office to perform duties required of [petitioner] by North Star." Petitioners' brief [13] does not suggest that the office was used as the principal place of business of petitioner's trading of stock options (assuming arguendo that the options activities were a trade or business), and we take the failure to assert such as a concession that petitioner did not use his home as the focal point of his stock option activities. Indeed, petitioner testified that he would be at the North Star office during most of the time the stock market was open and would keep in contact with the brokers from there. He also testified that in regard to the charting and recordkeeping of his option and commodity transactions, "I would normally do it at the office after the market closed. * * * I didn't really do much at home. I'd read the paper and try to get some information from there." In short, petitioners have based their entitlement to a home office deduction solely on the activities petitioner performed for North Star at home.

Petitioners have failed to prove that petitioner's use of an office in his home was "for the convenience of his employer," as required by section 280A(a)(1). North Star provided petitioner with working space at its office. Indeed, petitioner, a 50-percent shareholder and the president of North Star, likely could use as much of the

[17] Petitioners' reply brief was devfoted solely to arguments regarding the options/wash sale issue and did not address any other issues.

North Star office space as he required; there is no indication that the terms of petitioner's employment with North Star required him to maintain a home office. His meetings with the driving instructors were more for the convenience of those employees than of North Star; the fact that petitioner lived in Bloomington, in the southwest outskirts of the metropolitan area, allowed the instructors in the southwest quadrant to avoid having to drive across town to the North Star offices in St. Paul. Furthermore, there is no indication why petitioner should require an office to meet with the instructors.

We understand why petitioner might prefer the quietude of his home to the bustle of the North Star office; however, we think that his use of a home office to perform his other North Star duties was more for his convenience than for that of North Star. Even though the use of petitioner's home office was helpful and possibly appropriate in connection with his employment, Congress specifically intended to negate such a standard of allowability with its enactment of section 280A. H. Rept. No. 94-658, 1976-3 C.B. (Vol. 2) 695, 853; S. Rept. No. 94-938, 1976-3 C.B. (Vol. 3) 49, 186-187. [18] In short, we find that petitioners have not shown their entitlement to any home office deduction under section 280A.

DSAA Expenses

Petitioners next contend that they are entitled to a deduction in 1981 for unreimbursed expenses related to petitioner's duties as president of DSAA. On their 1981

[18] See Dudley v. Commissioner, T.C. Memo. 1987-607.

tax return, petitioners claimed total expenses relating to DSAA of $3,418.63 and reimbursement of $1,263.92, for a net deduction of $2,154.71. The parties have stipulated that petitioner has checks written in 1981 in the total amount of $1,992.64. Petitioners' only contentions on this issue are that those checks adequately substantiate the 1981 deduction and that "the revenue agent's demand for unobtainable invoices was beyond the requirements of section 162 and the items were not related to section 274."

The only explanation in the record as to the composition of the claimed expenses was the following statement on petitioners' 1981 tax return: "Taxpayer is president of a National Business Association and was required to attend International Convention in Vienna in June 1981." Section 274(d) provides that no deduction shall be allowed for any traveling expenses unless the taxpayer substantiates by adequate records or other sufficient evidence the amount of the expenditure, the time and place of the activity, and the business purpose. Section 274 obviously applies to at least some of the 1981 expenses. Petitioners have offered no records or other evidence to substantiate the business purpose of the stipulated checks, and they have not suggested which, if any, of the payments were for activities which are not subject to section 274. We therefore find that petitioners fail to meet their burden to prove their entitlement to any of those claimed expenses. Rule 142(a).

Section 6621(c)

Section 6621(c) provides for increased interest where there is an underpayment of taxes in excess of $1,000 attributable to tax motivated transactions in any year.

Section 6621(c) applies only with respect to interest accruing after December 31, 1984, even though the taxpayer entered into the tax motivated transactions before the date of the enactment of section 6621(c). Cherin v. Commissioner, 89 T.C. 986, 1000 (1987(; Solowiejczyk v. Commissioner, 85 T.C.552, 556 (1985), affd. per curiam without published opinion 795 F.2d 1005 (2d Cir. 1986).

Respondent has determined increased interest pursuant to section 6621(c) with respect to the portion of petitioners' 1980 tax liability attributable to the "gold commodity futures tax straddles transactions" which were the subject of the parties' closing agreement. Petitioners apparently do not dispute that the disallowed losses from the "gold commodity futures tax straddles transactions" are attributable to straddles as contemplated in section 6621a(c)(3)(A)(iii); thus, the underpayment attributable to those transactions is attributable to tax motivated transactions within the meaning of section 6621(c).

Petitioners' opposition to the imposition of the increased interest is based on their contention that they gave respondent's revenue agent an amended 1980 tax return reflecting that closing agreement, but that the revenue agent did not file the return. Petitioners reason as follows:

> Had the return been filed and an amount assessed against the Petitioner all payments could have been made before the effective date of the 1984 amendment to section 6621. Equity demands that the IRS agent's failure to file the amended return or process the item as an agreed adjustment, which resulted in the accruing of

interest under section 6621, should excuse the Petitioner from paying a higher rate of interest than that normally charged.

Petitioners' arguments do not seem to appreciate the purview of section 6621(c). It does not apply only to interest on assessments after December 31, 1984. Section 6621(c) applies to any interest accruing after that date. Interest on the underpayment attributable to petitioner's 1980 gold straddles accrues from April 15, 1981, the due date for the payment of petitioners' 1980 taxes, until such time as the taxes are paid. Secs. 6072(a); 6151(a); 6601. Thus any act of the revenue agent in filing or not filing petitioners' amended 1980 return would have had no effect on the accrual of interest. The only act which could stop the accrual of interest on the underpayment attributable to the straddles was petitioners' payment of the taxes by December 31, 1984. See Q and A-11, sec. 301.6621-2T, Temporary Proced. & Admin. Regs., 49 Fed. Reg. 59394 (Dec. 28, 1984).

Petitioners made some payments of taxes attributable to their 1980 year before the end of 1984, but they did not make sufficient payments to satisfy the entire liability for the 1980 tax year. In fact, it was not until October 1985 that they made payments sufficient to satisfy the tax liability, without regard to interest and additions to tax, as reflected on the amended 1980 return. Pursuant to Q and A-11 of section 301.6621-2T, Temporary Proced. & Admin. Regs., respondent applied the payments first to reduce the portion of the underpayment not attributable to the straddles. Petitioners have not challenged the validity of those temporary regulations, and we take that as a concession of the validity of the regulations as to them.

Thus, since petitioners did not pay the total underpayment attributable to the straddles by December 31, 1984, we find that they are liable for increased interest pursuant to section 6621(c) on the portion of the underpayment attributable to the straddles that remained unpaid after that date. [19]

To reflect the foregoing,

Decision will be entered under Rule 155.

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19 Our holdings thus render moot petitioners' Motion to Amend Petition (Embodying Amendment) and Motion to Submit Testimony to Confront Testimony Previously Ordered Stricken from Record But Nevertheless Cited in Respondent's Briefs.

APPENDIX C

92 T.C. 192

UNITED STATES TAX COURT

DAVID E. AND SANDRA L. GANTNER, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 2222-86. Filed January 30, 1989

In an earlier proceeding in this Court, Ps prevailed on one significant issue. Held: Ps are not entitled to litigation costs. R's position does not include any administrative action prior to the involvement of District Counsel, and the Eighth Circuit's opinions in Wickert v. Commissioner, 842 F.2d 1005 (8th Cir. 1988), and Berks v. United States, 860 F.2d 841 (8th Cir. 1988), do not mandate a different conclusion. The positions taken by R subsequent to District Counsel's involvement are substantially justified, in that they were supported by a rational construction of the applicable statutory provision.

Mark Arth, for the petitioners.

Genelle Forsberg, for the respondent.

OPINION

WELLS, Judge: This matter is before us on petitioners' motion for litigation costs pursuant to Rule 231 and section 7430. [1] On September 29, 1988, we issued our Opinion in Gantner v. Commissioner, 91 T.C. 713, in which we held for petitioners on one issue (the applicability of section 1091 to stock options), and for respondent in substantial or total part on the other issues. The issues before us in that opinion involved various deductions in the total amount of $61, 198.74, investment credits in the total amount of $2,164.48, and the appropriateness of increased interest under section 6621 with respect to commodities straddles deductions previously conceded by petitioners. We held for petitioners on the stock option issue, allowing them a deduction in the amount of $28,909.70 for 1980. Of the other approximately $22,000 of disputed deductions, we held that petitioners were entitled to only a small portion of these deductions ($900 - $1,000 by our rough calculation). We disallowed over 90 percent of the amount of investment credits in issue, and we held against petitioners on the question of the increased rate of interest.

Respondent opposes petitioners' motion on the grounds that (1) petitioners have not proved that respondent's position in the litigation was not substantially justified, and (2) petitioners' claimed costs are not reasonable. Section 7430 authorizes us to award reasonable litigation costs to a prevailing party in a proceeding in this Court if certain conditions are met. A taxpayer may be awarded litigation costs for a proceeding commenced after December 31, 1985 (such as the instant case, wherein the petition was filed in January 1986), if (1)

the taxpayer "has substantially prevailed" with respect to either the amount in controversy or the most significant issue(s) presented, and (2) the position of the Commissioner was "not substantially justified." Sec. 7430(c)(2)(A)(i) and (ii); Egan v. Commissioner, 91 T.C. 704, 711 (1988). In that we conclude that respondent's position was substantially justified, however, we need not decide whether petitioners are the prevailing parties.

Section 7430(c)(4) defines "the position of the United States," i.e., respondent's position in proceedings in this Court, to include "(A) the position taken by the United States in the civil proceeding, and (B) any administrative action or inaction by the District Counsel of the Internal Revenue Service (and all subsequent administration action or inaction) upon which such proceeding is based." (Emphasis supplied.) Section 7430(c)(4) was added to the Code in 1986 and applies to any amounts paid after September 30, 1986, in proceedings commenced after December 31, 1985. Pub. L. 99-514, sec. 1551(e), 100 Stat. 2753. It thus applies herein.

In Sher v. Commissioner, 89 T.C. 79, 86 (1987), affd. 861 F.2d 131 (5th Cir. 1988), we interpreted newly enacted section 7430(c)(4) to provide that respondent's position includes only those actions or inactions occurring at or after the point at which District Counsel becomes involved in the proceedings. We came to the same conclusion in Weiss v. Commissioner, 89 T.C. 779 (1987). On appeal, however, the Second Circuit disagreed with our conclusions in Weiss and held that the focus for determining respondent's position should be "on the Commissioner's final position as set forth in the statutory notice of deficiency." Weiss v. Commissioner, 850 F.2d 111, 115 (2d

Cir. 1988). We subsequently reconsidered our reading of section 7430(c)(4) in Egan v. Commissioner, supra, and held in a Court reviewed opinion that we would continue to follow Sher, and not follow the Second Circuit's conclusion in Weiss, except in cases appealable to the Second Circuit. See Golsen v. Commissioner, 54 T.C. 742 (1970), affd. 745 F.2d 985 (10th Cir. 1971).

In spite of Egan, however, petitioners argue that in the Eighth Circuit, to which appeal of the instant case lies, the position of the United States includes not only "the post-petition conduct but also * * * the pre-litigation conduct and the administrative action of the agency." Petitioners base their argument on their reading of Wickert v. Commissioner, 842 F.2d 1005, 1008 (8th Cir. 1988), affg. a Memorandum Opinion of this Court. In short, petitioners assert that the Eighth Circuit's opinion in Wickert holds that courts must review the actions of the Internal Revenue Service both before and after the filing of their petition to decide whether respondent took a position that was not substantially justified, and that we are bound to follow Wickert because of the rule in Golsen.

We do not agree with petitioners' reading of Wickert. In that the petition in Wickert was filed before 1986, section 7430(c)(4) did not apply in that proceeding. The Eighth Circuit looked to section 7430(c)(4), but only to buttress its conclusion that for actions commenced before 1986, the position of the United States encompassed only the government's in-court litigating position. 842 F.2d at 1008. Specifically, the Eighth Circuit stated (842 F.2d at 1008),

By providing in the new statute that the

"position of the United States" includes the government's administrative action or inaction as well as its in-court litigating position, Congress has made it clear that the pre-amendment [pre-section 7430(c)(4)] phrase at issue does not include administrative action or inaction. Moreover, these amendments were prospective only. We doubt that Congress would have made the amendments prospective only if it was merely clarifying, rather than modifying, existing law. See McDonald v. Commissioner of Internal Revenue, 764 F.2d 322, 340 (5th Cir. 1985).

In a more recent case also dealing with a petition filed prior to 1986 (i.e., before 7430(c)(4) was in effect), the Eighth Circuit similarly stated in a footnote that "[section 7430(c)(4)] requires the court to consider the reasonableness of the government's position at the administrative state." Berks v. United States, 860 F.2d 841, 843 n.3 (8th Cir. 1988). Insofar as we can ascertain, however, the Eighth Circuit has not yet decided a case where the interpretation of "position" under section 7430(c)(4) was squarely before the court, i.e., a case involving a petition filed after 1985.

We do not read the Eighth Circuit's comments in Berks and Wickert to require our review of respondent's activities prior to District Counsel's involvement. We reach that conclusion because we read the comments of the Eighth Circuit to distinguish merely between "administrative action or inaction" and "in-court litigating position." We think our interpretation of section 7430(c)(4) in Sher and Egan harmonizes with the Eighth Circuit's comments in that our interpretation would include

within the purview of respondent's "position" certain administrative action or inaction, specifically, "any administrative action or non-action by the District Counsel" taken before the part of the proceeding which occurs in court. Under our interpretation of section 7430(c)(4), any proceeding could contain two phases of respondent's "administrative action" -- actions prior to the initial involvement of District Counsel, which are not part of respondent's position (as defined by section 7430(c)(4)), and actions subsequent to District Counsel's initial involvement, which are part of respondent's position. The comments of the Eighth Circuit do not address whether that Court will consider only administrative action after District Counsel's involvement to be a part of respondent's position, or whether the Court might consider respondent's position also to include administrative action prior to District Counsel's involvement. We therefore conclude that the Eighth Circuit's stance on this issue is not contrary to our opinions in Sher and Egan.

As in Wickert, our conclusion is buttressed by subsequent legislative activity. The recently enacted Technical and Miscellaneous Revenue Act of 1988 ("TAMRA"), Pub. L. 100-647, 102 Stat. 3342, inter alia, amended section 7430. The provisions of former section 7430(c)(4) were modified and redesignated as section 7430(c)(7), which now provides that in proceedings commenced after November 10, 1988, the position of the United States" is to include positions taken as of the earlier of (1) the date of a taxpayer's receipt of the decision from respondent's Appeals Office, or (2) the date of the notice of deficiency. Pub. L. 100-647, sec. 6239, 102 Stat. 3743. In discussing the amendment of section 7430, the TAMRA Conference Report noted the then-existing

law (i.e., the law as applicable in the instant case) to be as follows:

> Position of the United States.--In determining whether the position of the United States was substantially justified, the position of the United States is determined beginning with the position in the civil proceeding, or, if applicable, the position taken by the IRS district counsel administratively. This generally does not include positions taken in the audit or appeals processes. [Emphasis supplied.]

H. Rept. 100-1104 (Conf.) 225 (1988). Thus while alone not dispositive of the issue, [2] the subsequent legislative history supports our conclusion that under section 7430(c)(4), as applicable herein, we are not to consider positions taken prior to the entry into the proceeding by District Counsel in our determination of whether respondent's position was substantially justified. The amendment made by section 6239 of TAMRA was prospective only, and we "doubt that Congress would have made the amendments prospective only if it were merely clarifying, rather than modifying, existing law." Wickert v. Commissioner, 842 F.2d at 1008.

Having held that respondent's position only includes stances taken subsequent to District Counsel's involvement, we must decide whether respondent's position in the instant case was substantially justified. In this regard, petitioners bear the burden of proof. Rule 232(3); Polyco, Inc. v. Commissioner, 91 T.C. 963, 965 (1988); Stieha v. Commissioner, 89 T.C.784, 790 n.5 (1987).

The bulk of petitioners' arguments and complaints about respondent's allegedly improper behavior are concerned with conduct on the part of a revenue agent and an individual in "the Review Section of the IRS." As we held above, however, we are not to consider such actions, prior to District Counsel's involvement, in our determination of whether respondent's position was substantially justified. Even if petitioners' dissatisfaction with the revenue agent's behavior were justified, respondent's actions during the audit process are simply irrelevant, given the language of section 7430.

With regard to the actions and positions taken by District Counsel in the instant case, respondent's refusal to settle the option/wash sale issue is the only position alleged by petitioners to be not substantially justified. Petitioners cite to Sher v. Commissioner, 89 T.C. at 85, and suggest that respondent's failure to settle the issue reflects that the government "used the costs and expenses of litigation against its position to extract concessions from the taxpayer that were not justified under the circumstances of the case." In that regard, however, we have seen no evidence that respondent pursued the instant litigation on the option/wash sales issue for any reason other than the lack of clarity of the statute on this issue; insofar as we can tell, respondent pursued the option/wash sale issue merely because he thought his position was correct. We certainly have seen no evidence that respondent' pursuit of the case subsequent to District Counsel's involvement was for purposes of harassment or embarrassment, or out of political motivation. See Sher v. Commissioner, 89 T.C. at 85.

We do not agree with petitioners' arguments, because

we think respondent's position on the option/wash sale issue was substantially justified. As we noted in our Opinion, there was no case law or regulation specifically addressing whether an option was a security for purposes of section 1091. We stated in our Opinion that other Code provisions, as well as provisions in Federal securities law, specifically included an option within the definition of a security, and that no definition of a security existed for purposes of section 1091. Respondent discussed other sources that included an option within the definition of "security," and reasoned by analogy that section 1091 also should be construed so as to include options within the term "securities." We find respondent's arguments and asserted statutory construction to have been rational and sound, but in our opinion incorrect. The fact that respondent ultimately was unsuccessful at litigation alone is insufficient to render his position not substantially justified; substantial justification for a position is not the same as a winning, legally correct argument on a position. See Sher v. Commissioner, 89 T.C. at 84; Minahan v. Commissioner, 88 T.C. 492, 498 (1987). In short, we are confident that respondent's position on the option/wash sale issue, though ultimately rejected by our analysis, was substantially justified, given the many other extant definitions in which an option was included as a security.[3]

In that petitioners did not substantially prevail on any other issues in the proceeding, we hold that they are not entitled to litigation costs pursuant to section 7430. We therefore need not address the reasonableness of their litigation costs. Based on the foregoing, petitioners' motion will be denied.

An appropriate order

<u>will be entered.</u>

APPENDIX D

INTERNAL REVENUE CODE OF 1954
(26 U.S.C.) § 7430

Sec. 7430. [as amended by Tax Reform Act of 1986 , Pub. L. No. 99-514, 100 Stat. 2085, Sec. 1551(h)]AWARDING OF COURT COSTS AND CERTAIN FEES.

[Sec. 7430(a)]

(a) IN GENERAL. -- In the case of any civil proceeding which is

(1) brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, and

(2) brought in a court of the United States (including the Tax Court and the United States Claims Court),

the prevailing party may be awarded a judgment (payable in the case of the Tax Court in the same manner as such an award by a district court) for reasonable litigation costs incurred in such proceeding.

[Sec. 7430(b)]

(b) LIMITATIONS. --

(1) REQUIREMENT THAT ADMINISTRATIVE REMEDIES BE EXHAUSTED.--A judgment

for reasonable litigation costs shall not be awarded under subsection (a) unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service.

(2) ONLY COSTS ALLOCABLE TO THE UNITED STATES.--An award under subsection (a) shall be made only for reasonable litigation and administrative costs which are allocable to the United States and not to any other party to the action or proceeding.

(3) EXCLUSION OF DECLARATORY JUDGMENT PROCEEDINGS--

(A) IN GENERAL.--No award for reasonable litigation costs may be made under subsection (a) with respect to any declaratory judgment proceeding.

(B) EXCEPTION FOR SECTION 501(c)(3) DETERMINATION REVOCATION PROCEEDINGS.--Subparagraph (A) shall not apply to any proceeding which involves the revocation of a determination that the organization is described in section 501(c)(3).

(4) COSTS DENIED WHERE PARTY PREVAILING PROTRACTS PROCEEDINGS.--No award for reasonable litigation costs may be made under subsection (a) with respect to any portion of the civil proceeding during which the prevailing party has unreasonably protracted such proceeding.

(c) DEFINITIONS.--For purposes of this section--

(1) REASONABLE LITIGATION COSTS.--The term "reasonable litigation costs" includes--

(A) in general.-- The term "reasonable litigation costs" includes--

(i) reasonable court costs, and

(ii) based upon prevailing market rates for the kind or quality of services furnished--

(I) the reasonable expenses of expert witnesses in connection with the civil proceeding, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States,

(II) the reasonable costs of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and

(III) reasonable fees paid or incurred for the services of attorneys in connection with the civil proceeding, except that such fees shall not be in excess of $75 per hour unless the court

determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate.

(B) DETERMINATION AS TO PREVAILING PARTY. --Any determination under subparagraph (A) as to whether a party is a prevailing party shall be made--

(i) by the court, or

(ii) by agreement of the parties.

(3) CIVIL ACTIONS. -- The term "civil proceeding" includes a civil action.

(4) POSITION OF UNITED STATES.--The term "position of the United States" includes--

(A) the position taken by the Unites States in the civil proceeding, and

(B) any administrative action or inaction by the District Counsel of the Internal Revenue Service (and all subsequent administrative action or inaction) upon which such proceeding is based.

[Sec. 7430(d)]

(d) MULTIPLE ACTIONS.--For purposes of this

section, in the case of--

(1) multiple actions which could have been joined or consolidated, or

(2) a case or cases involving a return or returns of the same taxpayer (including joint returns of married individuals) which could have been joined in a single proceeding in the same court, such actions or cases shall be treated as one civil proceeding regardless of whether such joinder or consolidation actually occurs, unless the court in which such action is brought determines, in its discretion, that it would be inappropriate to treat such actions or cases as joined or consolidated for purposes of this section.

[Sec. 7430(e)]

(e) RIGHT OF APPEAL.--An order granting or denying an award for reasonable litigation costs under subsection (a), in whole or in part, shall be incorporated as a part of the decision or judgment in the case and shall be subject to appeal in the same manner as the decision of judgment.